



DEC 21 1968

JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 644

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BILLY DON FRANKLIN BOULDEN,

*Petitioner,*

*vs.*

WILLIAM C. HOLMAN, Warden, Kilby Prison,  
Montgomery, Alabama,

*Respondent.*

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BRIEF FOR THE PETITIONER

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WILLIAM B. MOORE, JR.

RUSHTON, STAKELY, JOHNSTON & GARRETT

*Attorneys at Law*

1201 Bell Building

P. O. Box 270

Montgomery, Alabama 36101



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**BRIEF FOR THE PETITIONER**

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**Opinions Below**

This case was appealed to the Circuit Court of Appeals for the Fifth Circuit and is reported as *Boulden v. Holman*, 385 F. 2d 102. The Court's order was amended on June 24, 1968 (A. 124). The order of the District Court is unreported but is printed in the record (A. 106).

**Jurisdiction**

The judgment of the Circuit Court of Appeals was entered on November 3, 1967 (A. 113). The amended order of the Court of Appeals was entered on June 24, 1968 (A. 124). A Petition for Writ of Certiorari was filed on July 19, 1968 and was granted on October 14, 1968. The jurisdiction of the Court rests on 28 U. S. C. §1254 (1).

**Statutes, Constitutional Amendments  
and Rules Involved**

*The Fifth Amendment to the Constitution of the United States* is involved:

**"Rights of Accused in Criminal Proceedings**

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

*The Sixth Amendment to the Constitution of the United States* is involved:

**"Right to Speedy Trial, Witnesses, etc.**

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."



*Section 1 of the Fourteenth Amendment of the Constitution of the United States is involved.*

**"Citizenship Rights not to Be Abridged by States**

**"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."**

**Questions Presented**

**1. Were Boulden's (Petitioner) purported confessions, made on May 1, May 2, and May 6, 1964, voluntarily made in accordance with the standards of due process of the Fourteenth Amendment to the Constitution of the United States?**

**2. Were Boulden's (Petitioner) purported confessions, made on May 1, May 2, and May 6, 1964, in violation of the Fifth Amendment to the Constitution of the United States?**

**3. Was the reception in evidence of admission against interest and purported confessions obtained by police officers when Boulden was not represented by counsel and when he had not knowingly or intelligently waived the assistance of counsel, a violation of the Sixth and Fourteenth Amendments to the Constitution of the United States?**



4. Were Boulden's (petitioner) constitutional rights violated when each prospective jurymen who indicated that he was opposed to capital punishment or had a fixed opinion against it was excused from the venire?

(The basis for raising this question is *Witherspoon v. Illinois*, — US —, 20 L. ed 2d 776, 88 S. Ct. —, which was decided by this Honorable Court on June 3, 1968. Petitioner gave Notice of Appeal to the U. S. Court of Appeals on September 13, 1966.)

### Statement

Petitioner was convicted of first degree murder, condemned to die in the electric chair and is currently awaiting execution in Kilby Prison at Montgomery, Alabama. This case was appealed to the Supreme Court of Alabama and the conviction was upheld. Petitioner sought Executive Clemency to no avail (A. 82), then his parents filed a writ of habeas corpus in the United States District Court, Middle District of Alabama. That court denied the relief sought and an appeal was taken to the United States Court of Appeals for the Fifth Circuit, which denied relief.

On the afternoon of May 1, 1964, Billy Don Franklin Boulden, a negro male, 18 years of age, had sexual intercourse with Ann Burnett, a 15 year old white, married female. She took her clothes off and submitted on two occasions and Boulden used contraceptives during both acts of intercourse (A. 25). After the first act, the parties sat around and talked and then engaged in the act again, then started back out of the woods. As they walked down a wooded lane they were confronted by Lloyd C. Hays, a conservation officer for the State of Alabama. Neither

party had any knowledge that anyone else was in the area and this confrontation was a complete surprise. Upon seeing Officer Hays, Ann Burnett ran behind him and indicated that she had submitted against her will. Confusion followed and Hays was shot and stuck with a knife and was later found dead some fifty-five feet from the point where he was shot. After they were stopped by Hays and prior to the shooting and sticking Boulden had told Ann Burnett to run, and she did, hence she was not an eye witness when Hays met his death. She ran to a nearby highway and talked with a Deputy Sheriff and a State Trooper. They entered the area and a short time later apprehended Boulden.

The uncontested facts of record show that the patrolman who first apprehended Boulden told Boulden to run "because he had been wanting to kill a nigger a long time" (A. 32) and before he told him to run "he threwed the rifle up like he was getting ready to shoot there". The same officer asked Boulden his age and when Boulden told him, he told Boulden he "was old enough to die" (A. 34).

A large number of State Troopers and other peace officers converged on the scene and a number of the residents of the Flint Community began to assemble on the roadway nearby. Captain John Williams and Lt. E. B. Watts, State Troopers, who secured the alleged confessions were among those who arrived at the scene. Williams was the senior man present and took charge. He placed Boulden in his car and Williams stated that Boulden told him that "he didn't do it" (A. 41). Williams also told Watts that Boulden told him at first that "he did not commit this crime" (A. 46).

Boulden testified, "I told Captain Williams I didn't do it and he told me that I did. After that, I said—start back telling him about the two guys that was there, and he told me I was lying again. And he got mad and started cussing" (A. 33). (Boulden contended that two men, unknown to him, appeared on the scene and killed Hays.)

"Well, he (Williams) called me a little bastard and a few more names, told me I didn't have no business down there with that girl, and that was about it. Then he told me about if I didn't confess, that the officers that was wanting to kill me, he wasn't going to stop them".(A. 34).

Boulden told Captain Williams, "Well, I told him if he would get me out of there and wouldn't let them bother me, I would confess" (A. 34). On the way out Boulden saw a "large crowd of people" from the Flint Community. The Sheriff had a car in front and one behind the car conveying Boulden and had ordered the car in front to stay in front until the entourage crossed the Decatur Bridge.

The County Seat of Morgan County, the place where the killing took place, is Decatur, Alabama, but the Sheriff took Boulden and put him in a jail in the adjoining county in Athens, Alabama. When, in the jail, he was stripped of socks and shoes, shorts, short shirt, and pants, and given only a pair of coveralls (A. 35). The coveralls were his only item of clothing and he was not given any shoes from the time he arrived until after the first two confessions were obtained.

Captain Williams and Lt. Watts interrogated Boulden in the Limestone County Jail in Athens, Alabama beginning at about 10:30 or 11:00 o'clock on the night of May 1, 1964. Watts had a wire recorder hidden on his person on which

he recorded the first confession. However, Watts seems to differentiate a verbal confession from a written confession in that he stated: "What transpired between eleven and eleven fifty was getting acquainted with the defendant, informing him of his—some of his rights and talking to him in general about this crime" (A. 47). Watts testified that he did not talk with Boulden prior to turning on his recording machine (A. 49). Watts was asked:

"As I understand it, you had no conversation with this petitioner, this prisoner, did not warn him of any rights or had no conversation at all with him prior to the starting of this tape?

"A. That is correct." (A. 49)

This interview contained a confession that was transcribed by petitioner's attorney (A. 57). If Watts did not talk to Boulden until he turned on his machine then all of Watts' and Williams' warnings as to Boulden's constitutional rights should appear in the recording. We find the following on page 57 of the Appendix:

"Q. Nobody has threatened you or anything, we haven't offered you anything to get you to talk to us? You know—you remember me, Cpt. John Williams, Highway Patrol, that talked to you today out there today in my car, you remember me?

A. Yassuh.

Q. Now this is Lt. Watts, E. B. Watts, he is a State Investigator for the State of Alabama. In other words he works for our same department but he is in plain clothes where I wear a uniform.

A. Yessir, I understand.

• • • • •

"Q. Billy now you understand what we doing, we just want to talk to you, want you to tell us the truth about everything that happened today. Now you know you talked with me today in the car and I just want you to repeat it all for Lt. Watts here, just tell us the truth about what happened today.

A. Well—

Q. Now talk up where he can hear you cause he don't hear too good so talk up so he can hear you."

On page 81 of the Appendix:

"Q. Well let's get it written down and we'll be sure and have it right, then read it back and then tell us if it's right or wrong. This is much better than trying to remember say, a week or two, or a month or two after it happened.

A. Yes, sir, yall ready told me."

Boulden then signed a confession prepared by Lt. Watts shortly thereafter. It begins with a perfunctory:

"I, Billy Don Franklin Boulden CM, DOB 8-3-45 address Falkville 2, Alabama wish to make the following voluntary statement to E. B. Watts I have not been threatened in no way offer no reward nor hope of reward to get me to make a statement. I have been told by Mr. Watts that any statement I make can be used against me in a court of law." (A. 51)

It is obvious from an examinaiton of the oral confession and a copy of the written confession that Boulden was never advised that he had a right to remain silent. He certainly was never offered a lawyer.

It is of more than passing interest to note that when Watts talked with Boulden "in general about this crime"



he talked in an earthy manner using colloquial and Anglo-Saxon four letter words which he apparently felt would be more readily understood by his prisoner and he led him and suggested answers when needed. The signed statement does not have any of this in it but appears to be more the words of the State Trooper than that of the petitioner.

Boulden was a slight built boy weighing about 125-130 pounds who had a bad knee which was held together with a steel pin (A. 35) and who had a history of "spells and headaches". When asked if he had a headache or had trouble he answered, "Well, I had—my head had been hurting for about—I don't know, right after—see, it was about three or four months it had been hurting, on and off, but the night before in Athens over there it started worse, and I asked for some aspirin, but I couldn't get any." (A. 38)

Dr. Ronald Hamby, a psychologist of Montgomery, Alabama tested Boulden and determined that his IQ was about 83 which is dull-normal. He further testified that Boulden suffered from an anxiety complex and that he was susceptible to coercion. He was asked the question:

"Q. In your opinion, if this man were faced with what he thought was a life or death situation and was offered what he thought was an out, even though temporary, what would be his reaction?

A. He would take it.

Q. Would this include doing or saying whatever he thought someone else wanted to hear that he thought was in a position to help him?

A. Yes, sir, could I qualify that?

Q. Yes, sir?

A. He would do this because he is more concerned with immediate danger than he is a danger ten minutes

from now or tomorrow or next year; it's the immediate danger to himself that he is organized to escape from." (A. 29-30)

On the morning of May 2, 1964 after the written confession was obtained, Boulden was carried before Judge Bloodworth in Morgan County at 6:00 A. M. The Courtroom was very heavily guarded. There was much conversation about "mob violence". The Judge's academic lecture on the prisoner's rights included advising him that he had a right to a preliminary hearing (A. 6). This hearing was never had. He was advised he had a right to bond. Bond was never determined. The Judge advised him he had a right to a lawyer but stated that he "hasn't lost any right by not having a lawyer present" (A. 7).

Boulden had already made two confessions which would hardly have happened had he had a lawyer.

Four days later on May 6, 1964, Williams, Watts, Sheriff McRae and Deputy Fire Marshal Howard Dees came to Kilby, picked up Boulden and took him back to the scene of the murder and led Boulden through a reenactment and confession which again was taken down on concealed electronic equipment. No one ever told Boulden on that occasion that he had a right to remain silent or that he had any constitutional rights. The area was sealed off by armed men and Boulden was very much aware that he had been returned to the scene where Judge Bloodworth had inferred that mob violence could occur. Lt. Watts was carrying a concealed transmitter, and did most of the interrogating. A combination receiver and tape recorder was being operated by the prosecuting District Attorney while seated inconspicuously away from the scene. He recorded the in-



terrogation while Lt. Watts asked leading questions and converted the inadequate reply of Boulden's "I don't know" of May 1, to substantial statements of fact that would help to get a conviction. A transcript of the May 6, recordings, over the violent objection of Boulden's attorney, was read to the jury as Exhibits 29 and 30 (A. 10). Then just before the State rested its case the Solicitor made sure that the involuntary confession of Boulden was in the mind of the jury; the tape recording was played by Lt. Watts (A. 26-28) for the jury. Defense counsel objected—fruitlessly.

The Court asked each group of prospective jurors if they had a fixed opinion against capital or penitentiary punishment and the following jurors indicated that they did not believe in capital punishment and were promptly excused by the Court:

Redus C. Collier  
 Bradford W. Mixon  
 Fritz G. Holmes  
 Claude Patton  
 Elymus G. Riley  
 Neal Simpson  
 John L. Nelson  
 Jessie Simmons  
 Ray Mitchell  
 U. M. Rush  
 E. O. Moon  
 Henry H. Seibert  
 Arvle Coury  
 Fred E. Vickers  
 Hutchell Latham, Jr.  
 Ossie Leeth

### **Summary of Argument**

1. Two illegal confessions were taken from petitioner on the night of May 1 and in the early morning hours of May 2, 1964. Petitioner was not advised of his constitutional rights and did not waive said rights.

2. All prospective jurors in petitioner's case who indicated that they were opposed to capital punishment or that they did not believe in it or who had a fixed opinion against it were excused for cause. Thus, petitioner was tried by a "hanging jury" and his constitutional rights were violated.

### **ARGUMENT**

#### **I.**

**Two Illegal Confessions Were Obtained From Petitioner on the Night of May 1, 1964 and Early Morning Hours of May 2, 1964 by Two State Troopers.**

Petitioner's rights under the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States as to confessions and appointment of counsel in criminal cases in State Court were violated.

A realistic appraisal of the circumstances in each case must be made to determine whether or not a confession was the product of coercion.

In *Beecher v. Alabama*, 19 L. ed 2d 35, 280 Ala. 283, 193 So. 2d 505 the Court stated:

"But constitutional inquiry into the issue of voluntariness 'requires more than a mere colormatching of

cases' *Reck v. Pate*, 367 U. S. 433, 442, 6 L. ed 2d 948, 954, 81 S. Ct. 1541."

The right of a person to remain silent unless he chooses to speak is the unfettered exercise of his own will. In *Reck* the Court said:

"But it is hardly necessary to state that the question whether a confession was extracted by coercion does not depend simply upon whether the police resorted to the crude tactics of deliberate physical abuse. The blood of the accused is not the only hallmark of an unconstitutional inquisition."

As in *Reck*, Boulden had no prior criminal record or experience with the police. Also, as in *Reck* Boulden's family was kept from him until after he had confessed.

The threat of mob violence was apparent as in *Payne v. Arkansas*, 356 U. S. 569, 2 L. ed 975, 78 S. St. 844.

Boulden was never advised of his right to remain silent as in *Haynes v. State of Washington*, 373 U. S. 503, 10 L. ed 2d 513, 83 S. Ct. 1336.

The investigators were seeking answers and were determined to get them as in *Culombe v. Connecticut*, 367 U. S. 568, 6 L. ed 2d 1037, 81 S. Ct. 1860, where the Court said:

"... that he cannot but have been made to believe what the police hardly denied, that the police wanted answers and were determined to get them."

and in *Spano v. New York*, 360 U. S. 315, 3 L. ed 2d 1265, 79 S. Ct. 1202 where the Court said:

"They (the police) were rather concerned primarily with securing a statement from defendant on which they could convict him. The undeviating intent of the officers to extract a confession from petitioner is therefore patent. When such an intent is shown, this Court has held that the confession obtained must be examined with the most careful scrutiny."

The confessions that went to the jury were not the first ones taken but their existence "was vitally relevant to the voluntariness of petitioner's later statements", *United States v. Bayer*, 331 U. S. 532, 540-541, 91 L. ed 1654-1660, 67 S. Ct. 1394 and *Beecher v. Alabama*, *supra*.

As Judge Tuttle said in the Amended Order, Circuit Court of Appeals for the Fifth Circuit:

"Also, the refusal of the custodial officers to permit his parents to visit him before he gave the second confession bring the case very close to the circumstances announced in the recent Supreme Court decision in *Darwin v. Connecticut*, 794 Misc. 36 Law Week, 3441." (Later reported as — US —, 20 L. ed 2d 630, 88 S. Ct. 1488)

As in *Beecher* at the time of the first two confessions, Boulden had been ill and was suffering physical pain; he had also been denied medication; he had been threatened at gun point by the officers who first apprehended him and by a State Trooper at a later date prior to his confession.

It is easy for a mature, white, American citizen sitting in the security of his walnut paneled office to be mindful of his constitutional rights as to self-incrimination and his right to make no statement at all. The Totality of

Circumstances leaps to a far different conclusion when the defendant is a child, dull, is in jail, has never been in jail before, is cut off from his parents, is weak of body as well as mind, in pain, and is being induced by two large police investigators, who are skillful in the art of interrogation, and who have never advised the defendant of any right to remain silent but who are insistent that they want answers to their questions.

Clearly under the law as laid down in the above cited opinions of this Honorable Court, Boulden's confessions were coerced and involuntary and in violation of his constitutional rights.

## II.

**All Prospective Jurors in Petitioner's Case Who Indicated That They Were Opposed to Capital Punishment or That They Did Not Believe in It or Who Had a Fixed Opinion Against It Were Excused for Cause. Thus, Petitioner Was Tried by a "Hanging Jury" and His Constitutional Rights Were Violated.**

In *Keifer-Stewart v. Seagram*, 340 US 211-215, 95 L. ed 219, this Honorable Court considered grounds presented for reversal not passed on by the Court of Appeals but which were argued orally and in briefs before the Court for the first time. In that case, as here, the grounds raised only issues of law not calling for examination or appraisal of evidence.

In the case at hand no examination or appraisal of the evidence is necessary. The record of the trial reads as follows:



"The Court: Do you have a fixed opinion against capital punishment or penitentiary punishment?

Redus C. Collier raised his hand.

The Court: What is your position on capital punishment or penitentiary punishment?

Mr. Collier: I don't believe in capital punishment.

The Court: State?

Mr. Hundley: Challenge.

The Court: Any questions, Mr. Chenault?

Mr. Chenault: No questions.

The Court: You are excused. Have a seat in the audience for the time being:

. . . . .

"Bradford W. Nixon: I have a fixed opinion against capital punishment.

Mr. Hundley: Challenge.

The Court: Defense?

Mr. Chenault: No questions.

The Court: Stand aside, Mr. Nixon.

. . . . .

"Fritz G. Holmes: I have a fixed opinion against capital punishment.

Mr. Hundley: Challenge.

The Court: Defendant?

Mr. Chenault: No questions.

The Court: You can stand aside.

. . . . .

"Claude Patton raised his hand.

Mr. Hundley: What do you base your opinion on, Mr. Patton?

Mr. Patton: I have a fixed opinion, and I don't believe in capital punishment.

Mr. Hundley: I'll challenge Mr. Patton on that answer, on the ground that he doesn't believe in capital punishment.

The Court: Any questions by the defendant?

Mr. Chenault: No questions.

The Court: We will ask that question later, but will let you stand aside.

. . . . .

"John L. Nelson raised his hand.

Mr. Hundley: Challenge.

The Court: Do you have a fixed opinion against capital or penitentiary punishment?

Mr. Nelson: Capital punishment.

The Court: You think you would never be willing to inflict the death penalty in any type case?

Mr. Nelson: Yes, sir.

Mr. Hundley: We challenge.

The Court: Defendant?

Mr. Chenault: No questions.

The Court: Stand aside, Mr. Nelson.

. . . . .

"E. O. Moon raised his hand.

The Court: Do you have a fixed opinion against capital or penitentiary punishment?

Mr. Moon: Capital punishment.

The Court: You mean you would never inflict the death penalty in any case?

Mr. Moon: That's right.

Mr. Hundley: Challenge.

The Court: Defendant?

Mr. Chenault: No questions.

The Court: Stand aside, Mr. Moon.

. . . . .



"Elymus G. Biley raised his hand.

The Court: Do you have a fixed opinion against capital or penitentiary punishment?

Mr. Biley: Capital punishment.

Mr. Hundley: Challenge.

Mr. Chenault: No questions.

The Court: Stand aside, you are excused.

. . . . .

"Neal Simpson raised his hand.

The Court: Do you have a fixed opinion against capital punishment?

Mr. Simpson: Yes, sir.

Mr. Hundley: We challenge.

Mr. Chenault: No questions.

The Court: Stand aside. You are excused.

. . . . .

"Henry H. Seibert raised his hand.

The Court: Do you have a fixed opinion against capital punishment?

Mr. Seibert: Yes, sir.

Mr. Hundley: We challenge.

The Court: Defendant?

Mr. Chenault: No questions.

The Court: Stand aside. You are excused.

. . . . .

"Arvle James Coury: I have a fixed opinion against capital punishment.

Mr. Hundley: We challenge.

Mr. Chenault: No questions.

The Court: Stand aside. You are excused.

. . . . .

"Fred E. Vickers stated he had a fixed opinion against capital punishment.

Mr. Hundley: We challenge.

Mr. Chenault: No questions.

The Court: You are excused.

• • • • •

"Hutchell Latham, Jr., raised his hand.

Mr. Doss: We challenge.

The Court: Is this a fixed opinion against capital punishment?

Mr. Latham: Yes, sir.

The Court: Defendant?

Mr. Chenault: No questions.

The Court: You are excused.

• • • • •

"Jesse Simmons: I have a fixed opinion against capital punishment.

Mr. Hundley: We challenge.

Mr. Chenault: No questions.

The Court: You are excused.

• • • • •

"Ray Mitchell: I have a fixed opinion against capital punishment.

Mr. Doss: We challenge.

Mr. Chenault: No questions.

The Court: You are excused.

• • • • •

"U. M. Rush raised his hand, stating he had a fixed opinion against capital punishment.

Mr. Hundley: Challenge.

Mr. Chenault: No questions.

The Court: Stand aside.

• • • • •

"Ossie Leeth raised his hand.

Mr. Hundley: We challenge.

The Court: Defense!

Mr. Chenault: No questions.

The Court: You are excused."

With two possible exceptions no attempt was made to determine whether these jurors who did not believe in "capital punishment" could return a verdict of death. Hence, under the holding of this Court in *Witherspoon v. Illinois*, — US —, 20 L. ed 2d 776, 88 S. Ct. —, the State of Alabama has stacked the deck against the petitioner and to execute his death sentence would deprive this petitioner of his life without due process of law.

### Conclusion

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed or in the alternative the death sentence imposed by the State of Alabama should be stayed forever.

Respectfully submitted,

WILLIAM B. MOORE, JR.  
Attorney for Appellant-Petitioner

